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CPLR 3403: Court Adds New Criterion for Determining Whether a Special Trial Preference Should Be Granted

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To hold that a driver-passenger relationship between initial and succeeding plaintiffs satisfies the "derivative" requirement of *DeWitt* would be to extend offensive collateral estoppel to the hypothetical train-wreck situation.[114]

In a recent case, *Camaioni v. Caruso*,[115] the owner and operator of car 1 had been successful in a negligence action against the owner of car 2. Plaintiffs, passengers in car 1, then sought summary judgment in a personal injury action against the owner of car 2, relying on *DeWitt*.

It was held that the plaintiffs (passengers) *do not* derive their right to recovery in the sense that DeWitt (owner) derived his right to recovery from his driver. Moreover, under the *DeWitt* test, a paramount question continues to be whether the issues are identical, and whether they have been actually litigated and determined in the prior action. Here, neither movants' affidavits nor the record presented, showed what issues were tried or on what cause of action the prior judgment was granted. To that extent, movants did not sustain their burden of establishing an identity of issues.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Court adds new criterion for determining whether a special trial preference should be granted.

CPLR 3403(a) provides:

> Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference . . .
> 3. An action in which the interests of justice will be served by an early trial.[116]

It is now well-settled that the mere old age of a plaintiff will not warrant the granting of a trial preference.[117] Moreover, where

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[114] One hundred passengers are injured in a train wreck. The first fifty to institute suits are unsuccessful. The fifty-first (possibly an infant) recovers judgment. The remaining passengers could recover on the basis of the fifty-first suit, while the defendant could not take advantage of the fifty adjudications of its innocence. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernard Doctrine*, 9 STAN. L. REV. 281 (1957); *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 336 (1968).

[115] 57 Misc. 2d 107, 290 N.Y.S.2d 325 (N.Y.C. Civ. Ct. 1968).

[116] The trial preference available under this Rule, should be distinguished from the "preferences" available under the rules in the first and second departments; *e.g.*, Rule IX, Rules for New York and Bronx County Supreme Court. The local rule merely entitles plaintiff to stay on the general calendar, rather than being placed on the deferred calendar. Where a trial preference is granted under Rule 3404, however, the case will generally be advanced to the ready calendar. *See* 7B MCKINNEY'S CPLR 3403, supp. commentary 13, 14 (1964).

[117] Bitterman v. 2007 Davidson Ave., 278 App. Div. 759, 104 N.Y.S.2d 81 (1st Dep't 1951).

destitution is plaintiff's ground for a preference, it must be shown that defendant's negligence was the cause of plaintiff's destitution.[118]

In a recent case, *Tintner v. Marangi*,[119] plaintiff, 72 years of age, had made two prior motions for a trial preference but was unable to make a showing of "destitution" or to comply with the "stringent provisions of the rules of the Appellate Division." In the instant action, plaintiff based his motion on a change of circumstances, *i.e.*, due to the loss of a part-time job because of superannuation he was forced to share a small bedroom with his wife and two grandchildren in his son's home. In sustaining plaintiff's motion on the ground of changed circumstances and in the interests of justice, the court explicitly added a new criterion to be considered in determining whether a special trial preference should be granted:

> if a litigant's resources are inadequate to permit living in dignity and self-respect—commensurate with age and prior milieu—it is both just and meet that we grant a special trial preference.[120]

It was a *change* in plaintiff's circumstances that entitled him to a trial preference here. It should be noted that had plaintiff and his wife been sharing a small bedroom with their grandchildren prior to the superannuation, it is perhaps doubtful that this motion would have been granted.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4103: Untimely demand results in waiver.

CPLR 4103 provides that, when it appears during the course of a non-jury trial[121] that the relief required, although not originally demanded, entitles the adverse party to a trial by jury, the court must give such party an opportunity to demand a jury trial.[122] However, an untimely demand results in a waiver.

In *Northern Operating Corp. v. Anopol*,[123] the appellate division, second department, dismissed defendant's appeal from an order denying a motion for a jury trial. Although the court held

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[118] *See* Nazario v. Martha Cab Corp., 41 Misc. 2d 1010, 247 N.Y.S.2d 6 (Sup. Ct. Kings County 1964).

[119] 57 Misc. 2d 318, 292 N.Y.S.2d 779 (Sup. Ct. Rockland County 1968).

[120] *Id.* at 320, 292 N.Y.S.2d at 780-81.

[121] When it is apparent before trial that there exists a legal issue, triable by jury, CPLR 4102 is applicable.

[122] For the rationale behind this provision, see 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶4103.01 (1965) and *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 166-67 (1965).

[123] 30 App. Div. 2d 690, 291 N.Y.S.2d 831 (2d Dep't 1968).